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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 25

UNITED STATES OF AMERICA, *Petitioner*,

v.

THOMAS F. JOHNSON.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THOMAS F. JOHNSON IN OPPOSITION

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The Daily Record Co., Baltimore 3, Md.

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Opinions Below

The Opinion of the Court of Appeals (Pet. App. 12-22) is reported at 337 F. 2d 180. The Opinion of the District Court is reported at 215 F. Supp. 300.

Jurisdiction

The judgment of the Court of Appeals was entered on September 16, 1964. On October 19, 1964, the Chief Justice extended the time for filing a Petition for a Writ of Certiorari to and including November 15, 1964. The Petition for a Writ of Certiorari was filed on November 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether the provision of Article I, Sec. 6 of the Constitution that speech or debate in the Congress shall not be questioned elsewhere permits the government to make a criminal charge that a member of Congress collaborated with others in the preparation of a speech in the House of Representatives, made the speech there for their benefit and received a gift for doing so.

The constitutional question presented by the evidence at the trial was this: Does the Speech and Debate Clause permit the government to contend that a member of Congress was motivated, or influenced in whole or in part, in making a speech in the House of Representatives by a contribution made shortly before the speech to his political campaign for re-election.[1]

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[1] If the Writ is granted, Respondent wishes to reserve the right to argue certain important questions which were raised below but were not decided in favor of Respondent. If any one of them is determined favorably to Respondent, the reversal by the Court of Appeals of Respondent's conviction would be sustained. These questions are: (1) whether, in enacting the 1866 Conspiracy Statute (18 U.S.C. Sec. 371), Congress intended that it should apply to a charge of conspiracy with respect to the making of a speech in the House of Representatives for a gratuity, (2) whether the conspiracy charge was fatally defective because (a) its alleged unlawful objects were so vague, indefinite and all pervasive they did not inform Respondent of the nature of the accusation in conformity with the Sixth Amendment and the Due Process Clause of the Constitution and (b) it did not allege any false statement or misrepresentation, (3) whether the F.B.I. may continue its procedure to circumvent the Jencks Act by destroying original witness-interview notes made by an F.B.I. agent, i.e., whether such notes should be deemed a "statement" or "report" under the Jencks Act, (4) whether in a criminal case the government may breach the seal of secrecy of grand jury testimony by permitting its own witness or witnesses to read grand jury testimony without entitling a defendant to access to the transcript of all grand jury testimony, (5) whether the instruction of the District Judge to the jury as to criminal intent with respect to the substantive counts was so inadequate Respondent's rights were not protected and (6) whether vilification of Respondent by government counsel in summation to the jury violated the teaching of this Court in *Berger v. United States*, 295 U.S. 78, 88.

Constitutional and Statutory Provisions Involved

Article I, Section 6 of the United States Constitution provides in part:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

18 U.S.C. 371, provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. 281, which was repealed after the alleged commission of the acts involved in this case, provided in part:

> Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

Statement

The Statement of the government in its Petition requires amplification.

An object of the Count I conspiracy charge was alleged to be the deprivation of the right of the government to the faithful services of Respondent as a member of the House of Representatives, "uninfluenced" by payments of money by other defendants, "in relation to matters pending in the House of Representatives" and "before the Department of Justice" (R. App. 5).[2] At the trial there was no evidence that the speech of Respondent made in the House of Representatives on June 30, 1960, had any relationship to any pending bill or other matter pending in the House or to any matter before the Department of Justice.[3]

At the trial almost all of the important testimony with respect to events in the year 1960 related to the speech of Respondent. We estimate that over 60% of all testimony with respect to Respondent involved an inquisition into the motives and purposes of the speech, its authorship, content, and relationship, if any, to a check in the amount of $500.00 dated June 20, 1960, sent by Robinson to Respondent.

It was undisputed that Edlin and Robinson, who were associated with two Maryland Savings and Loan Associations one of which (First Colony) was located at Elkton in the Congressional District of Respondent, hoped that a member of Congress might deliver a speech defending state savings and loan institutions from attacks made upon them by the federal savings and loan association (R. App.

[2] "R. App." refers to Respondent's Appendix in the Court of Appeals.

[3] The visits of Respondent to Justice, the basis of the substantive counts of the indictment, did not occur until after March 15, 1961.

182-184). Edlin told Respondent in May, 1960, of these allegedly unjustified attacks (R. App. 186, 197). On May 27, 1960, Respondent was shown a copy of a newspaper article in the Washington Evening Star of May 27, 1960, characterizing all Maryland state savings and loan associations as "phonies", as evidence of the mistreatment of the independent savings and loan associations (R. App. 186). Heflin, a government witness who was a public relations man for a small Institute of Independent Savings and Loan Association, testified that he told Respondent it "was categorically unfair. I still think so" (R. App. 189, 201). Respondent turned Heflin over to his Administrative Assistant and Heflin supplied him with some facts and figures for a draft of the speech. Both Heflin and the Administrative Assistant testified that it was prepared by the latter (R. App. 189, 190, 200, 277, 479).

The speech in the House of Representatives criticized the article in the Evening Star and defended Maryland state savings and loan associations from the attack made upon them in that article. The speech contained no reference to First Continental Savings and Loan Association or First Colony Savings and Loan Association, with which other defendants were associated, or to any other named association (R. App. 931).

The letter of Robinson to Johnson enclosing the $500.00 check of June 20, 1960, made clear that it was a contribution to Johnson's 1960 political campaign for re-election (R. App. 565). The check was endorsed by Johnson to his campaign treasurer, was deposited in the account of the treasurer and was used as, in the case of other campaign contributions, for advertising, radio, television, etc., in support of the 1960 candidacies of John F. Kennedy, Lyndon Johnson and Respondent (R. App. 246-252, 567). The contribution was

listed in the official report of the treasurer filed within 30 days of the November 1960 election. Although Robinson was reimbursed for his check by First Continental Savings and Loan Association, there was no evidence contradicting the testimony of Respondent and Robinson that Robinson had not told Respondent he had been reimbursed for his campaign contribution (R. App. 752).

No one testified in this case that there was an understanding, if Respondent would make the speech, he would receive this campaign contribution or that he had agreed to make the speech for the campaign contribution. Respondent and Robinson each testified to the contrary (R. App. 570, 751, 752, 783).

In holding that there was sufficient evidence for the jury that the $500.00 check of Robinson represented compensation for the speech, the Court of Appeals relied heavily upon jesting statements attributed to Edlin and Robinson, out of the presence of Respondent, each claiming authorship of the speech (Pet. App. A. p. 44). The Court overlooked the fact that these hearsay statements were *not* admitted against Respondent (Tr. 421, 422). The Court of Appeals also relied upon other hearsay statements attributed to Robinson and Edlin out of the presence of Respondent, stating, or intimating, that Respondent was on their payroll (Pet. App. A. pp. 44-45). These statements were not admissible against Respondent under any known legal theory. In a conspiracy case an exception to the hearsay rule is only made when the statement is in furtherance of the object of the conspiracy *and* it has first been shown, by independent evidence, that the defendants combined together in a common enterprise. These statements out of the presence of Respondent were not made in furtherance of any future object and there was no independent

evidence that he combined with others in a common enterprise.

Government counsel argued to the jury that Respondent must have been motivated or influenced by the $500.00 political campaign contribution in deciding to make the speech in the House of Representatives (Tr. 5819-5830, 6200-6205) and on appeal in the Court of Appeals the brief for the government asserted "the government certainly did not have to prove that the Congressman's *sole* motive in giving the speech was to receive compensation or to aid Edlin or Robinson . . ." (Govt. Brief p. 42). Thus it was the position of the government that, under this amorphous conspiracy charge, it was not necessary for the government to establish that Respondent was employed, or even consciously agreed, to make his speech for the campaign contribution; all that was necessary was for the testimony to indicate that Respondent may have been influenced by the campaign contribution made 10 days before the speech or by a wish to aid Edlin or Robinson. If a jury could be permitted to speculate whether the gift of a campaign contribution may have influenced a senator or a representative in making a speech in the Congress, members of the legislative branch of the government would be placed at the mercy of the executive power.

Reasons for Denying the Writ

The unanimous opinion of the Fourth Circuit holding unconstitutional the Count of the indictment, charging that Respondent, a member of Congress, conspired to defraud the United States by collaborating with others in the preparation of a speech and making the speech in the House of Representatives for a gift followed the opinions of this Court in *Tenney v. Brandhove*, 341 U.S. 367 (1951) and *Kilbourn v. Thompson*, 103 U.S. 168 (1881). The Fourth

Circuit decision is not in conflict with that of any other Circuit nor is it in conflict with any opinion of this Court. Indeed, there is no decision anywhere in the United States or in England at variance with the opinion of the Court of Appeals.

Nor has the Court of Appeals decided an important question of federal law which has not been settled. The question presented was of great general importance in English Constitutional history until 1689 when it was then settled in England by the Bill of Rights. The question was of importance in the United States in 1789; it was then settled by the plain, unambiguous, unqualified, definitive declaration of Article I, Section 6 that speech in the Congress "shall not be questioned" elsewhere. If there could be any doubt as to the meaning of the constitutional prohibition, designed to secure legislative freedom, it was authoritatively determined by this Court in *Kilbourn* and again in *Tenney*.

1. Since the Bill of Rights of 1689 when the principle of legislative liberty was first established, the Courts of England have consistently held that no criminal or civil charge may be maintained in the Courts against a member of Parliament with respect to speech or debate there and the House of Commons and the House of Lords alone can hear, convict and impose sanctions with respect to alleged improper or criminal speech and debate.[4]

2. In America even before the Federal Constitution, the privilege as to legislative freedom of speech was deemed so essential that it was embodied in the Articles of Con-

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[4] *Ex parte Wason*, 4 Q.B. 573 (1869); Lord Denman in *Stockdale v. Hansard*, 9 Ad. & E. 1, 113: "whatever is done within the walls of either assembly must pass without question in any other place." Lord Chief Justice Colerige in *Bradlaugh v. Gossett*, 12 Q.B.D. 271, 275: "what is said or done within the walls of Parliament cannot be inquired into in any court of law."

federation of 1777; in the Maryland Declaration of Rights of 1776; in the Constitution of the State of Massachusetts in 1780; and in the Constitution of New Hampshire in 1784. At the Federal Constitutional Convention the pertinent clause of Article I, Section 6 was adopted without opposition. The significance accorded the clause is best indicated by the comment of Mr. Justice Story in his *Commentaries on the Constitution* (p. 630):

> The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belong to the legislation of every State in the Union as matter of constitutional right.

Since the Constitution of almost every state of the Union contains a provision comparable to the Speech and Debate Clause of Article I, Section 6, no state court has entertained such a charge as that involved here.

3. Whether Article I, Section 6 should be narrowly interpreted to insure that it does not protect alleged criminal conduct with respect to speech or debate in the Congress, as the Petition contends, is not unsettled. This constitutional privilege has been universally interpreted liberally to achieve its fundamental purpose and no American or English Court has ever attempted to qualify, condition or limit its full constitutional scope. This Court unanimously and authoritatively determined in *Kilbourn* and in *Tenney* that this clause of Article I, Section 6 must be liberally interpreted.

4. The Petition asserts that the criminal charge in this case did not "question" the speech of Respondent in the

House of Representatives but his antecedent conduct in allegedly agreeing to accept a gratuity for the speech (Pet. pp. 7, 8). This contention does not present an undetermined question because it necessarily implies that it is constitutionally permissible for the government to impeach the motivation of speech in the Congress. The motivation of a speech is so closely related to its content, they are of course inseparable because no words are spoken or written without purpose. In *Tenney*, decided as recently as 1951, this Court rejected this very contention of the government that the constitutional prohibition of Article I, Section 6 did not apply to official acts of members of the legislative branch when the government charged an unworthy, dishonest, corrupt, or criminal purpose. The Court pointed out that the constitutional principle would be of little value if the elected representatives of the people could be subjected to the burden of a trial or to the hazards of a jury's speculations as to motive.

The Petition postulates a theoretical situation in which a member of Congress agrees to make a venal speech but does not make it and suggests that in that situation no speech would be impeached (Pet. p. 8). This may or may not be so but in this case the government did impeach a speech made in the House of Representatives in a clear and definitive way and, if the Speech and Debate Clause did not bar such a criminal charge, the Clause would be sterilized from any value or significance.

5. The notion of the Petition that judicial privilege involves an "analogous area" (Pet. p. 8, 10) is not correct. There is no analogy between legislative and judicial privilege because Article I, Section 6 establishes the House and the Senate as the exclusive tribunals to hear, convict and impose sanctions with respect to alleged improper or criminal speech and debate in the Congress.

6. The asserted apprehension of the government that the effect of the decision of the Court of Appeals casts doubt upon the validity of the anti-bribery statutes (Pet. p. 7) is without substance. It was not the decision of the Fourth Circuit which casts doubt upon the validity of these statutes but the decisions of this Court in *Kilbourn* and in *Tenney* that the speech and debate provision must be deemed to apply not only to speech and debate in the legislative branch of government but to all official acts of its members.

The federal bribery statutes make it an offense for one to give to a member of Congress, and for a member of Congress to accept, a bribe to influence "his act, vote or decision" "on any question, matter, cause or proceeding which may at any time be pending in either House" (18 U.S.C. 204; 18 U.S.C. 205). The government did not charge Respondent with violating either of these statutes or with conspiring to do so. Since this case concerns the entirely different charge of conspiracy to defraud the United States in violation of 18 U.S.C. Sec. 371, if the Writ were granted, this Court would have no opportunity to determine the validity of the anti-bribery statutes. Any consideration by the Court of their validity would violate the Court's most frequently repeated canons of constitutional decision. A constitutional question is not decided when it is not necessary for the Court to do so; the Court will not permit a litigant, who is unable to show an interest in the outcome, to raise the question and the Court will not decide a constitutional question which upon the facts is not presented for decision.

The government could not have charged Respondent with violating the federal bribery statutes, or conspiring to do so, because by their terms they are limited to *official* action, vote or decision with respect to *pending* matters.

The speech which Respondent made in the House of Representatives consisted of brief personal remarks unrelated to pending legislation or to any other matter in the House. His remarks expressed his personal view that an article in the Washington Evening Star disparaging all Maryland State savings and loan associations was unjust and unfair. They could not be deemed a vote, decision or any other official act pertinent to the business of the House. Indeed, his remarks were as unofficial as if contained in a speech made in Baltimore.

7. Although this Court conclusively determined the issue in *Kilbourn* and *Tenney*, the Petition asks the Court to do so again "so that Congress may establish such machinery as is appropriate to deal with such matters" (Pet. p. 7). Congress needs no instruction as to its exclusive authority in the limited area of speech and debate for it has zealously guarded it by excluding speech and debate from the anti-bribery statutes. As recently as 1954 the Senate appointed a special committee to hear charges of improper speech and conduct against a Senator of Wisconsin. The Senate voted to sustain findings of the committee and publicly humiliated and disgraced the Senator by censoring him.

8. The Petition claims that a criminal charge against a member of Congress with respect to speech and debate would not interfere with legislative independence (Pet. p. 9), and that a judicial tribunal is a better forum for determining guilt or innocence than a legislative tribunal (Pet. p. 10). These assertions of the government suggest that the constitutional prohibition embodies an unwise, unsound public policy. The argument is one that would have been appropriate in the Constitutional Convention of 1789;

it was foreclosed by Article I, Section 6 and has been repudiated by this Court in *Kilbourn* and later in *Tenney*.

9. The Petition is forced to rely upon remote provincial cases which have little relationship with that at bar (Pet. p. 10). *Rex v. Boston*, 33 C.L.R. 386 (N.S.W) (1923) charged a conspiracy by a member of a legislative assembly of New South Wales, Australia, and others to wrongfully induce the Province to acquire certain private property. Speech or debate of the legislative member was not involved. In *Regina v. White*, 13 S.C.R. (N.S.W.) 322 (1875) one was charged with offering a bribe to a member of the Legislative Assembly of New South Wales for his vote for a pending bill. The issue of Parliamentary privilege was not raised. Justice Faucett of the Supreme Court of New South Wales was so unaware of the Speech and Debate clause of the Bill of Rights that, in holding an offer to bribe a legislator was a criminal offense, he relied upon the fact that members of the House of Commons had been convicted *by the House* and expelled for accepting bribes.

In *Regina v. Bunting, et al.*, 7 O.R. 524 (Ontario, 1885) (G.A. App. 29-57) certain members of the provincial assembly were charged with conspiring to vote for certain bills in consideration of bribes. The Court held this was a criminal offense cognizable by the Court. Although no speech was involved, as here, Justice O'Connor wrote a vigorous dissent (G.A. pp. 46-57) concluding that the psychological state of mind of legislative members, their opinions and motives, could not be inquired into; and interference by the Courts would be an invasion of the independence of the legislative body and its members to the detriment of public liberty.

Conclusion

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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December, 1964